

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 29 March 1994

relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty
(IV/33.941 - HOV SVZ/MCN)

(Only the German, French and Dutch texts are authentic)

(94/210/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas :

Having regard to the Treaty establishing the European Community,

PART ONE

THE FACTS

I. General

Having regard to Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal,

Having regard to the application submitted on 16 May 1991 by Havenondernemersvereniging SVZ, pursuant to Article 10 of Regulation (EEC) No 1017/68, for a finding that an infringement has been committed,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 26 of Regulation (EEC) No 1017/68 and with Commission Regulation (EEC) No 1630/69 of 8 August 1969 on the hearings provided for in Article 26 (1) and (2) of Regulation (EEC) No 1017/68 of 19 July 1968⁽²⁾,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions in the Field of Transport,

A. *The complaint lodged by Havenondernemersvereniging SVZ*

- (1) Havenondernemersvereniging SVZ (hereinafter referred to as HOV-SVZ), an association of undertakings operating in the port of Rotterdam, lodged a complaint against:
 - Deutsche Bundesbahn (DB),
 - Maritime Container Network (MCN),
 - Transfracht Deutsche Transportgesellschaft mbH (Transfracht).
- (2) The complaint relates to the conditions governing the carriage by rail of sea-borne containers to or from Germany via a Belgian, Dutch or German port.
- (3) The complainant considers that the rail tariffs applied by Deutsche Bundesbahn (hereinafter referred to as 'DB') to the carriage of sea-borne containers between Germany and the Belgian and Dutch ports are much higher than those applied to the carriage of the same containers via the German ports.
- (4) According to the complainant, such practices are aimed at favouring carriage by DB and constitute an abuse of a dominant position prohibited by Article 86 of the Treaty.

⁽¹⁾ OJ No L 175, 23. 7. 1968, p. 1.

⁽²⁾ OJ No L 209, 21. 8. 1969, p. 11.

- (5) The complainant also considers that the 'Maritime Container Network' (MCN) agreement concluded between Deutsche Bundesbahn, Nederlandse Spoorwegen (NS), the Société Nationale des Chemins de Fer Belges (SNCB), Intercontainer and Transfracht for the carriage of sea-borne containers infringes the provisions of Article 85 of the Treaty.

B. Specific features of the container transport sector

- (6) International goods transport is increasingly being carried out by means of containers.
- (7) Containers carried by sea have specific technical characteristics allowing them to be loaded on several levels in vessels.

Such containers, hereinafter referred to as 'sea-borne containers', are carried essentially by sea, but also require on-carriage and off-carriage by land after transit through a sea port.

- (8) In some cases, the shipping companies provide a 'door-to-door' service covering the whole of the transport operation, including inland transport. In such cases, the shipping companies generally purchase such transport services from independent firms and resell them as part of an overall service.
- (9) Such inland transport is provided for the shipping companies or for shippers by road hauliers, inland waterway transport operators or combined transport operators.
- (10) In the combined transport of goods, notably the inland transport of sea-borne containers, the railway undertakings do not market transport services direct to shippers except in very rare cases involving very large consignments.
- (11) Combined transport services are organized and sold to shippers by combined transport operators. Such operators are transport undertakings that have specific equipment, such as handling equipment and specialized wagons. Such undertakings canvas their customers, carry out transport operations using block trains or by means of separate consignments, deal with administrative and customs formalities at frontier crossings and see that the goods are received on arrival.

- (12) However, in performing their services, operators must purchase railway traction services and access

to infrastructures from the railway undertakings, which alone can provide them.

C. The undertakings involved

(a) The railway undertakings

- (13) DB, NS and SNCB are the national railway undertakings operating in Germany, the Netherlands and Belgium respectively.

Since 1 January 1994, Deutsche Bundesbahn and Deutsche Reichsbahn have been merged to form Deutsche Bahn AG which is the successor to Deutsche Bundesbahn.

(b) The combined transport operators

- (14) Intercontainer is a joint subsidiary of 24 European railway undertakings responsible for organizing and selling international container carriage services.

Its legal form is that of a Belgian cooperative society, and it was set up in 1967 with its headquarters in Brussels. It participates in the market as an operator by purchasing rail traction from the railway undertakings.

- (15) Until 1990 Intercontainer operated exclusively in the market segment involving sea-borne containers and swap bodies in international traffic. Since 1991 it has been able to act in all segments of the market: containers, swap bodies, trailers and semi-trailers, in both national and international traffic.

- (16) Transfracht

Transfracht is an 80% subsidiary of DB. The rest of its capital is held by Deutsche-Verkehrs-Bank AG, which is itself a subsidiary of DB. Transfracht participates in the market as an operator, but also purchases the necessary rail services from the railway undertakings.

D. Regulatory framework within which the railway undertakings operate

- (17) Until 31 December 1992 the national railway undertakings each had within their own country a monopoly, granted to them by the public authorities, for the use of the railway infrastructure and for the provision of railway services.

A railway undertaking established in one Member State thus did not have any right of access to the infrastructures in the other Member States in order to provide international services.

- (18) The conditions governing the operation of the market have changed since 1 January 1993 with the coming into effect of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways⁽¹⁾. The Directive gives the railway undertakings, subject to certain conditions, a right of access to infrastructures in Member States other than the Member State in which they are established, notably for the purpose of operating international combined transport services.

- (19) This proceeding relates to facts pre-dating the coming into effect of that Directive, whose provisions cannot therefore be taken into account here. The Commission notes that, at all events, the coming into effect of the Directive does not alter the anti-competitive nature of the practices examined below.

E. Economic data

- (20) Container traffic handled by the main ports between Hamburg and Antwerp in recent years was as follows:

1986 to 1990

(1 000 TEU (20-foot equivalent units))

	1986	1987	1988	1989	1990	Trend 1986 to 1990
Hamburg	1 246	1 451	1 620	1 750	1 969	+ 58 %
Bremen	1 000	1 055	1 138	1 249	1 163	+ 16 %
Rotterdam	2 897	2 839	3 268	3 617	3 666	+ 26 %
Antwerp	1 313	1 437	1 470	1 474	1 580	+ 20 %
Total	6 456	6 782	7 496	8 090	8 378	+ 30 %

- (21) Total sea-borne container traffic to or from Germany in 1987 amounted to 1,4 million containers, of which 550 000 passed through the German ports and 860 000 through the Belgian or Dutch ports.

- (22) The relative shares of the various modes of transport for the inland carriage of those 1,4 million containers were as follows in 1987/88:

	German ports/ Germany	Belgian and Dutch ports/Germany
Road transport	[...] ⁽¹⁾	[...]
Inland waterway transport	[...]	[...]
Combined rail transport	[...]	[...]

⁽¹⁾ In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 28 of Regulation (EEC) No 1017/68.

- (23) Transport handled by the main combined transport operators is as follows:

CONTAINER TRANSPORT HANDLED BY INTERCONTAINER

(in TEU 20-foot equivalent unit)

	1988 (April to December)	1989	1990	1991	Trend 1989 to 1991 (%)
Belgian ports/ Germany	[...]	[...]	[...]	[...]	[...]
Germany/Belgian ports	[...]	[...]	[...]	[...]	[...]
Dutch ports/ Germany	[...]	[...]	[...]	[...]	[...]
Germany/Dutch ports	[...]	[...]	[...]	[...]	[...]
Total	[...]	[...]	[...]	[...]	[...]

- (24) CONTAINER TRANSPORT HANDLED BY:
Transfracht
(between the German ports and Germany)

(number of containers)

	1988	1989	1990	1991	Trend 1989 to 1991 (%)
Full containers	[...]	[...]	[...]	[...]	[...]
Empty containers	[...]	[...]	[...]	[...]	[...]
Total	[...]	[...]	[...]	[...]	[...]

II. The 'maritime container network' agreement

- (25) The organization of the carriage of sea-borne containers to or from Germany involves, on the one hand, three railway undertakings for the supply of the necessary rail services (traction, access to infrastructure and international coordination of the services) and, on the other, two combined transport operators.

⁽¹⁾ OJ No L 237, 24. 8. 1991, p. 25.

- (26) In the case of transport operations from the German ports, DB provides all the abovementioned rail services.
- (27) In the case of transport operations from the Belgian and Dutch ports, DB provides the rail services on German territory and SNCB and NS provide them on their respective territories.
- (28) As far as the operators are concerned, until 1987 Transfracht effected on its own account the carriage by rail of sea-borne containers in Germany passing through a German port.
- (29) Intercontainer for its part effected the international carriage of sea-borne containers to or from Germany through a Belgian or Dutch port.
- (30) On 1 April 1988 DB, NS, SNCB, Intercontainer and Transfracht signed an agreement establishing the 'maritime container network' (MCN).

The agreement provides for cooperation between the signatories in respect of the carriage by rail of sea-borne containers to or from Germany which pass through a Belgian, Dutch or German port.

- (31) The protocol to the agreement does not provide for the creation of a separate legal entity, but establishes two coordination structures: the 'Steering Committee' and the 'Bureau Commun'.
- (32) The Steering Committee consists of six members appointed by the contracting parties. Three are nominated by Transfracht and three by Intercontainer. The protocol provides that, from among the members nominated by Intercontainer, there shall be appointed one representative of SNCB and one representative of NS and that, from among the members nominated by Transfracht, there shall be appointed three representatives of DB and Transfracht.

The Steering Committee is the MCN's decision-making and supervisory organ. It determines the MCN's general policy as regards, among other things, the services offered and the prices.

- (33) The Bureau Commun is the body which administers the agreement and is itself administered by Transfracht in Frankfurt. It consists of a head appointed by the Steering Committee and staff appointed by Transfracht and Intercontainer.
- (34) According to paragraph 10 of the protocol, 'the contracting parties regard the Bureau Commun as an organization common to Transfracht and Intercontainer whose task consists, in terms of producing, buying and selling, in developing and marketing services in their name, for their account and under their own responsibility in the geographical

market defined in Title II' — that is to say the carriage via the Belgian, Dutch and West German ports of sea-borne containers to or from places in the former Federal Republic of Germany, a territory subsequently enlarged to include the former German Democratic Republic.

- (35) The Bureau Commun is directly responsible for the functions of buying, fixing rates and tariffs, selling and supervising transport.

The other functions, and in particular invoicing, collecting sums due, handling complaints and marketing, are divided between Intercontainer, which handles traffic to and from the Belgian and Dutch ports, and Transfracht, which handles transport to and from the German ports.

- (36) In international traffic, the Bureau Commun sells services on behalf of Intercontainer, but Intercontainer does the invoicing.

III. Policy on prices for the carriage by rail of containers to or from Germany through a Belgian, Dutch or German port

A. The criteria for setting tariffs

- (37) During the proceeding, the representatives of Transfracht stated that the tariff basis applied to multi-port supply was laid down in accordance with the tariff structure of the 'InGrid' model previously applied by Transfracht to domestic German traffic.
- (38) The InGrid tariff system was based on a geographical division of Germany into 144 areas with one net tariff for all rail traffic to and from each area (map at Annex I).

The system was designed on the basis of three principles: neutrality as to the nature of the goods, customer neutrality and port neutrality.

- (39) By letter sent to the Commission on 20 December 1991 in response to a request for information, Transfracht stated that 'port neutrality is ensured through the InGrid system, which divides the Federal Republic of Germany into 144 areas. All points of departure and arrival within one and the same area correspond to one and the same net price, which depends on the distance between the area and the north German ports, and in particular Hamburg. Of course, the real setting of prices takes account of the competitive situation. In the case, for example, of the carriage of 20-foot containers, the train has technical advantages over the lorry which allow Transfracht to make special offers to customers.

On the other hand, the carriage of 40-foot containers is easily achievable by lorry and allows Transfracht only very limited flexibility as regards prices.'

- (40) In April 1988 the InGrid tariff system was extended to traffic between Germany and the Belgian and Dutch ports. On 1 July 1991 the system was extended to the territory of the former German Democratic Republic, and the 144 areas were replaced by a new grid of 65 areas (map at Annex 2).

- (41) At a later stage in the proceedings, the representatives of DB and Transfracht stated that the level of the selling prices charged under the MCN also depended on production costs, and more precisely on three factors:

- the number of containers carried and whether or not block trains could be used,
- the quality of rail infrastructure in the ports,
- frontiers crossed, which would entail additional costs.

B. Tariffs charged under the MCN

- (42) The tables set out in Annexes 3 to 9 show, in respect of a number of major links, the tariffs for transport via the northern ports and via the western ports.
- (43) The western ports are Antwerp and Rotterdam and the northern ports Hamburg, Bremen and Bremerhaven.
- (44) In the case of the northern ports, from 1 July 1990 to 30 September 1990 tariffs were differentiated between Hamburg, Bremen and Bremerhaven. As from 1 October 1990 the same tariff has applied to all three ports.
- (45) In the case of the ports of Rotterdam and Antwerp, the tariffs have been identical as from 1 July 1990.

PART TWO

LEGAL ASSESSMENT

I. Legal assessment of the MCN agreement in the light of Article 85 of the Treaty

A. The concept of agreement

- (46) The MCN protocol between DB, SNCB, NS, Intercontainer and Transfracht establishes cooperation

between those undertakings in the provision of services for the carriage of sea-borne containers. Notwithstanding the term used, the protocol reflects a genuine concurrence of will between the parties and thus constitutes an agreement within the meaning of Article 85 of the Treaty.

B. The undertakings in question

- (47) The railway undertakings concerned, namely DB, NS and SNCB, are undertakings which carry out the carriage by rail of persons and goods.

They are undertakings within the meaning of Article 85 of the Treaty.

- (48) Intercontainer is a cooperative society whose object is the combined transport of goods.

It, too, is an undertaking within the meaning of Article 85 of the Treaty.

- (49) Transfracht is a company under German law which carries out the combined transport of goods. It is likewise an undertaking within the meaning of Article 85 of the Treaty.

C. Relations between Transfracht and DB

- (50) Transfracht is a subsidiary of DB and of Deutsche Verkehrs-Bank AG, which is itself a subsidiary of DB. The three undertakings accordingly constitute a DB-controlled 'group' within which Transfracht does not enjoy any real autonomy in determining its course of action on the market.

- (51) Consequently, in accordance with the case-law of the Court of Justice⁽¹⁾, the agreement, in so far as it applies to relations between Transfracht and DB, is not caught by the provisions of Article 85 of the Treaty.

D. The market

(a) The relevant service market

- (52) This case relates to the inland carriage of sea-borne containers to or from Germany through a Belgian, Dutch or German port. Such services are provided for shipping companies or shippers by road haulage undertakings, inland waterway transport operators and combined transport operators, in accordance with the arrangements described in points 6 to 12.

⁽¹⁾ In particular Case 15/74 Centrafarm v. Sterling Drug, [1974] ECR, p. 1147.

- (53) During the proceedings, some of the parties argued that the relevant service market was not that for inland transport alone, but a wider market covering all services, including sea-borne carriage.
- (54) Under the case-law of the Court of Justice⁽¹⁾, the concept of market under the competition rules means that it must be possible for effective competition to exist between the products or services forming part of it.
- (55) However, it is an established fact that railway undertakings and shipping companies operate at two different stages of an economic process and are not in competition for the provision of transport services.
- (56) It must therefore be concluded that the abovementioned argument put forward by the parties is not well founded.
- (57) During the proceedings, other parties stated that the relevant service market in this case was not only the market for container transport, but that for the inland transport of goods, including in particular the transport of cereals, coal and steel.
- (58) It should be noted in this respect that the Court of Justice ruled in its judgment of 9 November 1983 in *Michelin v. Commission* that 'for the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products'⁽²⁾.
- (59) In the present case, the Commission considers the transport services involving the carriage of goods by sea-borne container are not interchangeable with non-containerized transport services and constitute a separate market. Their specific nature has been reinforced in recent years with the generalization of liner transport by container. This mode of transport allows significant productivity gains compared with traditional transport; according to some studies⁽³⁾, productivity gains are threefold, and amount to as much as sevenfold as regards port operations, which can be carried out much more quickly, allowing faster turnaround of vessels.
- (60) Consequently, the transport in bulk of containerizable goods in chartered ships no longer constitutes an economically viable alternative.
- (b) The relevant geographic market
- (61) In defining the relevant geographic market, the following factors should be taken account:
- (62) The main German, Dutch and Belgian ports, namely Hamburg, Bremen-Bremerhaven, Rotterdam and Antwerp, are equipped to handle large-scale sea-borne container traffic.
- (63) Because of the geographical configuration of Europe, certain points in Germany are closer to the Belgian or Dutch ports than to the German ports.
- (64) The ports in these three Member States are linked to the main localities in Germany by numerous rail and motorway infrastructures.
- (65) The liner conferences loading or unloading sea-borne containers in the German, Belgian or Dutch ports charge the same transport price whatever the port, since the ports in the three countries are considered by the liner conferences to be substitutable.
- (66) When the shipping companies provide 'door-to-door' service and for this purpose purchase rail transport services, such services are provided by combined transport operators, which organize the whole of the rail transport operation, irrespective of the number of railway undertakings involved, which for their part merely sell a rail traction service to the operators.
- It is thus a matter of indifference to the shipping companies whether a rail transport operation between a Belgian or Dutch port and a point in Germany involves one or several railway undertakings.
- (67) Similarly, it does not matter to the road haulage operators whether they carry sea-borne containers between a point in Germany and a German port or between a point in Germany and a Belgian or Dutch port.
- (68) Consequently, the shipper or shipping company purchasing inland transport between a point in Germany and a port chooses the mode of transport and the route offering the best conditions irrespective of political frontiers.
- (69) Account should also be taken of the views of some railway operators, as set out in the documents obtained by the Commission in examining the case.

⁽¹⁾ In particular Case 85/76 *Hoffmann La Roche v. Commission*, [1979] ECR, p. 461.

⁽²⁾ Case 322/81, [1983] ECR, p. 3461.

⁽³⁾ See in particular S. Gilman and M. Graham, *The case for a conference rate making authority in the inland sector*, July 1990.

- (70) In reply to a request for information, Transfracht wrote to the Commission on 20 December 1991 stating:

'In accordance with paragraph 2 of the protocol, MCN operates on the sea-borne container transport market comprising the Federal Republic of Germany/ports in the Hamburg-Antwerp range. It would appear useful in this context to explain the meaning of the term Hamburg-Antwerp range and the significance of those ports for the carriage of large sea-borne containers.

As the term suggests, the Hamburg-Antwerp range comprises all the seaports situated geographically between Hamburg and Antwerp, along the European coast. As far as container traffic coming from overseas is concerned, these European ports represent a uniform destination area.

According to the Conference Rules of the major container transporters, a single price must be charged for carriage from an overseas port to a port in the Hamburg-Antwerp range.

For the large shipping companies, whose influence on container transport structures on the European continent is considerable, it is extremely important that such ports, which are considered equivalent in terms of prices, should operate logistically as communicating tubes. This may be illustrated by looking at the route followed by a container ship arriving in Europe: the ship will land firstly at one of the ports in the Hamburg-Antwerp range in order to unload part of its cargo and, if possible, load new containers, possibly empty. While the ship continues its route to another port in the Hamburg-Antwerp range, the containers unloaded in the first port should be transported, if possible, to their consignees in Europe, should be emptied and sent back, either empty or perhaps even with a new cargo, to a second port in the Hamburg-Antwerp range. If logistical coordination works properly, when it arrives at the second port, the ship will unload the rest of its cargo and load up again with the containers that have arrived in the meantime. The degree of precision required for such coordination is evident from the fact that most of the shipping companies require their vessels to spend no longer than 12 hours in port. Since the costs alone of operating a container ship may range from US \$ 40 000 to 80 000 a day, it is naturally understandable that the company should exploit its container ship to the maximum.'

- (71) The conclusion to be drawn from the points set out above is that the relevant geographic market is that covering the territories of Germany, Belgium and the Netherlands on which the three railway under-

takings and the two combined transport operators operate, such territories representing a substantial part of the common market.

E. Restrictions of competition

- (72) The carriage by rail of sea-borne containers from overseas to Germany, or vice versa, may be effected by several routes:

- either from the 'northern' ports, i.e. the German ports,
- or from the 'western' ports, i.e. the Belgian and Dutch ports.

- (73) Where carriage is performed from the German ports, it involves only the undertakings in the group made up of DB and Transfracht. DB supplies the essential rail services for all of the transport in Germany, and Transfracht acts as combined transport operator.

- (74) Where the carriage is performed from the Belgian or Dutch ports, it necessarily requires the involvement of two railway undertakings to supply the rail services to the operators:

- NS and DB where the carriage is effected from a Dutch port,
- SNCB and DB where the carriage is effected from a Belgian port.

Each railway undertaking receives only that part of the revenue which corresponds to the services it has supplied.

Combined transport is supplied by only one operator, which in this instance is Intercontainer.

- (75) The fact that, up to 31 December 1992, each railway undertaking had a monopoly over its infrastructures does not rule out the existence of competition at other levels.

- (76) Competition is possible firstly between the railway undertakings, which can potentially, acting as operators, sell their transport services direct to the shippers or shipping companies. While the supply of such services requires SNCB and NS cooperate with DB, each railway undertaking has nevertheless a direct interest in supplying its services for all, or at least part, of the journey between the North Sea and points in Germany.

- (77) Such potential competition similarly exists between, on the one hand, the railway undertakings when they are acting directly as operators and, on the other, between the operators Transfracht and Intercontainer. Only the relations between DB and its subsidiary Transfracht are excluded from such potential competition.

(78) Lastly, a possibility of competition exists between the combined transport operators, who can technically operate on the market from either the northern ports or the western ports.

(79) The existence of such competition is borne out by a 'note to board members' drawn up by Intercontainer's Management Board on 25 February 1986, which states:

'Description of the situation

Large sea-borne container traffic between:

— inland destinations in the Federal Republic of Germany on the one hand and

— the Belgian, Dutch and West German seaports on the other,

is characterized:

(a) by competition between modes of transport (rail, road and inland waterway);

and

(b) by competition between routes, i.e. between the links to and from:

— the western ports, notably Rotterdam and Antwerp,

— the northern ports, notably Bremerhaven and Hamburg.'

(80) The existence of such competition is also borne out by the statements made by NS at the second meeting of the 'Group of those responsible for combined transport' held in Paris on 1 September 1987, the minutes of which state:

'The sea-borne container market is financially profitable and therefore of interest to NS ([...] of traffic and [...] of its revenue); however, the market share is small ([...] at Rotterdam, [...] in the Federal Republic of Germany). Although Intercontainer must determine business policy, specific measures are being examined by NS and DB to restrict sterile competition on the German market between Transfracht (German ports) and Intercontainer (Rotterdam): a joint unit in Frankfurt will make full offers to shipowners promoting the maximum rail route.'

the Hamburg-Antwerp range into Germany and vice versa are provided by the MCN Bureau Commun.

(82) Through the intermediary of this joint body, the parties to the agreement make a single offer on the basis of tariffs agreed between them, and the transport is provided respectively by Intercontainer to or from the western ports and by Transfracht to or from the northern ports.

(83) Consequently, the MCN agreement has the object and effect of eliminating actual or potential competition between Intercontainer and Transfracht for the marketing of combined transport services to shippers and shipping companies.

If the agreement did not exist, shippers and shipping companies could make use of competition between the two operators and use the services of the one which offered the best service in terms of quality and prices.

(84) The establishment of a joint marketing entity eliminates this source of competition.

(85) The establishment of such a joint entity also has the object and effect of restricting actual or potential competition between the railway undertakings for the sale of combined transport services direct to shippers or shipping companies.

(86) The MCN agreement also has the object and effect of restricting actual or potential competition between, on the one hand, the railway undertakings and, on the other, Intercontainer and Transfracht for the sale of transport services to shippers and shipping companies.

(87) The existence of the MCN agreement also gives Transfracht and Intercontainer an important competitive advantage through the preferential relations which the agreement establishes with the railway undertakings providing the rail services, the cost of which accounts for an essential part of the final selling price of the operators. The agreement also enables Intercontainer and Transfracht to avoid the risks of active competition with one another and to be in a stronger position *vis-à-vis* other competitors.

(81) Under the cooperation agreement concluded between DB, SNCB, NS, Intercontainer and Transfracht, the organization and marketing of rail transport services for sea-borne containers from ports in

(88) Consequently, the MCN agreement also has the effect of restricting competition on the relevant market by making access more difficult for new competitors, which would not enjoy the same advantages as Transfracht and Intercontainer.

- (89) The agreement concluded between DB, SNCB, NS, Transfracht and Intercontainer on the setting up of the MCN thus has the object and effect of restricting competition on the market for the inland transport of sea-borne containers between German territory and the ports situated between Antwerp and Hamburg, in breach of the provisions of Article 85 (1) of the Treaty.

F. Effect on trade between Member States

- (90) The agreement relates to the conditions for the carriage of sea-borne containers within Germany and between Germany and the Belgian and Dutch ports.

The agreement relates to the conditions for the carriage of sea-borne containers within Germany and between Germany and the Belgian and Dutch ports.

The agreement has a direct effect on the transport available to shippers for the carriage of sea-borne containers. The agreement also has an effect on the activity of the Belgian, Dutch and German ports, notably by encouraging a deflection of traffic. The agreement concluded between DB, NS, SNCB, Transfracht and Intercontainer thus affects trade between Member States within the meaning of Article 85 of the Treaty.

G. Article 3 of Regulation (EEC) No 1017/68

- (91) As is evident from the heading to Article 3, it applies to agreements whose sole object and sole effect is :

- the application of technical improvements, or
- the achievement of technical cooperation,
- it being understood that, in order to achieve these objectives, the undertakings may rely on the means set out in Article 3 (a) to (g).

For the purposes of this proceeding, it is for the Commission to examine whether the MCN agreement is intended either to apply technical improvements or to achieve technical cooperation.

- (92) The Commission notes firstly that, during the proceeding, the parties to the agreement did not indicate any technical improvement whose application would have required the MCN agreement to be concluded.

- (93) It should also be borne in mind that the decision-making instrument under the MCN agreement is

the Steering Committee, whose tasks are as follows :

1. definition or amendment of the short/medium/long-term business policy concerning the traffic covered by the agreement, and in particular the definition or amendment of the policy on production and prices ;
2. definition of the principles governing the supply of services ;
3. routing problems ;
4. selection and monitoring of the manager of the 'Transfracht/Intercontainer Bureau Commun' and the determination, in an appropriate specification document, of the detailed responsibilities and tasks of the staff attached to the Bureau Commun ;
5. periodic report on the operation of the Bureau Commun, the results obtained and the consequences to be drawn ;
6. operating budget of the Bureau Commun.

The Commission notes that such activities do not involve the application of technical improvements or technical cooperation.

- (94) This analysis is confirmed by Transfracht in its letter of 20 December 1991 to the Commission stating that MCN's activities relate to :

- the marketing of transport services for and on behalf of Intercontainer and Transfracht,
- the acquisition of rail services and other additional services from the railway undertakings,
- the establishment of a system of selling prices in line with the market,
- the publication of existing offers,
- contacts with customers and customer relations,
- advertising existing offers,
- the settlement of accounts between the parties to the agreement,
- budgeting, documentation and statistics.

None of these activities is intended to apply technical improvements or achieve technical cooperation.

- (95) The Commission further notes that an essential object of the agreement is to determine the conditions for marketing the combined transport services supplied by Intercontainer and Transfracht as operators.

However, while technical cooperation is necessary in international rail transport, it involves essentially the supply of rail services by each railway undertaking, an activity which is not covered by the MCN agreement, which relates only to the sale of combined transport by the specialized operators.

(96) It is evident from the above that the essential objective of the MCN agreement is to market services for the carriage of sea-borne containers within the framework of a single offer drawn up by the Steering Committee and the Transfracht/Intercontainer Bureau Commun.

(97) The Commission considers that any agreement between undertakings on the joint marketing of products or services may have direct or indirect implications at technical level. However, such implications would not be sufficient to bring the agreement within the scope of Article 3 of Regulation (EEC) No 1017/68. That Article requires that the agreement must have the sole object and effect of applying technical improvements or of achieving technical cooperation.

(98) The Commission takes the view that these conditions are not met in the case in point.

H. Article 5 of Regulation (EEC) No 1017/68

(99) The Commission considers that it has not been demonstrated that the establishment of a joint structure for the sale of the relevant transport services is such as to improve the quality of the services. Prior to the conclusion of the agreement, such services were already performed by Transfracht and Intercontainer, and the Commission notes that, as from the end of 1992, such services have once again been offered by the two operators without any demonstrable change in the quality of the service.

(100) Nor has there been any proof of an improvement in the productivity of the relevant undertakings or of technical or economic progress.

(101) At all events, the Commission considers that the reductions of competition imposed by the agreement are significant and cannot be deemed to be essential to the attainment of an improvement in the quality of the services. The Commission notes in this respect that, for all other European international combined traffic, several operators are able to compete with one another without such a situation impairing the functioning of the market.

(102) Lastly, the agreement makes it possible to eliminate competition in respect of all carriage of containers

by rail between Germany and the Belgian, Dutch and German ports.

As a result, the MCN agreement makes it possible for the undertakings to eliminate competition in respect of a substantial part of the transport market concerned.

(103) Consequently, the Commission is of the opinion that the conditions required by Article 5 of Regulation (EEC) No 1017/68 for the granting of an exemption from the ban on restrictive practices are not met.

I. Article 22 (2) of Regulation (EEC) No 1017/68

(104) Pursuant to Article 22 (2) of Regulation (EEC) No 1017/68, the Commission may impose on undertakings fines of from ECU 1 000 to 1 000 000, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently they commit an infringement of Article 85 of the Treaty; in fixing the amount of the fine, regard must be had both to the gravity and to the duration of the infringement.

(105) During the proceeding, some of the parties stated that they had acted in good faith in considering that the MCN agreement was legal under Community law.

(106) In this respect, the Court of Justice has ruled that 'it is not necessary for an undertaking to have been aware that it was infringing the competition rules in the Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object the restriction of competition' ⁽¹⁾.

(107) The Commission considers that, in view of the operating arrangements of the MCN, the undertakings could not have been unaware that the agreement did indeed have as its object the restriction of competition between the various undertakings operating on the market.

(108) However, it is evident from the written and oral proceedings that the conclusion of the MCN agreement was considered by SNCB, NS and Intercontainer as an attempt to remedy the tariff discriminations of which they had been victims for many years in respect of traffic from the western ports.

⁽¹⁾ Case C-279/87 Tippex v. Commission [1990], ECR I, p. 261.

- (109) It is also established that, prior to 1 January 1993 — the date on which Council Directive 91/440/EEC was implemented — SNCB and NS had no other option but to conclude an agreement with DB in order to operate international rail transport services.
- (110) It is consequently apparent that the conclusion of the MCN agreement was a result of the tariff practices imposed by DB, which are examined below.
- (111) Account should also be taken of the fact that the parties terminated the agreement following the sending of the statement of objections.
- (112) More generally, the Commission holds the view that a defensive agreement cannot exempt an undertaking from the imposition of fines. Nevertheless, taking into account the factors set out above and the particular features of the case, the Commission considers that there is no need to impose fines for infringement of Article 85.

II. Legal assessment in the light of Article 86 of the Treaty

- (113) The Court of Justice has held⁽¹⁾ that, in defining the relevant market within the meaning of Article 86 of the Treaty, it is sometimes necessary to draw a distinction between the different levels of an economic process. In its abovementioned judgments, the Court drew a distinction between, on the one hand, the market for the raw materials necessary for the manufacture of a product and, on the other, the market on which the product is sold.
- (114) The Commission is of the opinion that this analysis is applicable to the case in point and that a distinction should be drawn between, on the one hand, the market on which DB operates and, on the other, the market on which the combined transport operators operate.

A. The rail transport market in Germany

- (115) As regards the definition of the market on which an undertaking may have a dominant position, the Court of Justice stated in its judgment in *Michelin v. Commission*:

'It must be noted that the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and

behave to an appreciable extent independently of its competitors and customers and consumers. For this purpose, therefore, an examination limited to the objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration'⁽²⁾.

- (116) Accordingly, examination of the characteristics of a sector of activity in order to decide whether or not it constitutes a market within the meaning of Article 86 of the Treaty cannot be carried out in the abstract, but on the contrary must be established on a case-by-case basis with the aim of analysing the behaviour of the undertaking in question in the light of competition law.
- (117) In the case in point, account should first of all be taken of the regulatory framework within which the railway undertakings were operating at the time of the relevant facts.
- (118) The conditions governing the supply of international rail transport services are laid down essentially in the Convention concerning International Carriage by Rail (Cotif) of 9 May 1980 and its appendices laying down uniform rules for the contract concerning the international carriage of passengers by rail (CIV) and the contract concerning the international carriage of goods by rail (CIM).
- (119) Those provisions are based on the principle of the indivisibility of the railway undertakings, i.e. the assumption that there is no separation between infrastructure management and the provision of carriage.
- (120) Until 31 December 1992, each railway undertaking consequently enjoyed, in the Member State within which it was situated, a railway monopoly that covered, on the one hand, superintendence of the infrastructure and, on the other, superintendence of rail traction on its infrastructures.

No railway undertaking had a right to operate rail services abroad, unless it had a special legal basis for doing so set out in a convention between states.

- (121) However, the railway undertakings' monopoly did not prevent other public or private undertakings from purchasing wagons on their own account or in order to rent them to other undertakings. Provided that they fulfilled the requisite technical conditions, such wagons could be registered by the railway undertakings and circulate on the infrastructure so long as the traction was provided by the railway undertakings' locomotives. The use of

⁽¹⁾ Notably in Joined Cases 6 and 7/73 *Commercial Solvents v. Commission*, [1974] ECR, p. 245 and Case 22/78 *Hugin v. Commission*, [1979] ECR, p. 1869.

⁽²⁾ See point 58.

such wagons gave rise to competition between owners of private wagons and railway undertakings that also owned similar wagons.

(122) In the case in point, in its reply to the statement of objections, DB argued that, for the carriage of goods, the railway undertakings are always in competition with road hauliers and often in competition with inland waterway transport and that consequently such undertakings operate on one and the same overall market for the carriage of goods.

(123) It should be borne in mind on this point that, in its judgment in the *Ahmed Saeed Flugreisen* case⁽¹⁾, the Court of Justice ruled that there was no overall market for the carriage of travellers that covered scheduled flights, charter flights, the railways and road transport, as well as scheduled flights on other routes which might serve as substitutes.

The Court held that 'the test to be employed is whether the scheduled flight on a particular route can be distinguished from the possible alternatives by virtue of specific characteristics as a result of which it is not interchangeable with those alternatives and is affected only to an insignificant degree by competition from them'.

(124) The Commission considers that this reasoning can be transposed to the goods sector and that competition cannot be assessed in overall terms. The competitive situation depends in particular on whether or not competing modes of transport are actually present. It is generally accepted that competition from inland waterway transport is confined to those routes on which there are efficient inland waterways.

(125) At all events, for the purposes of this case, an analysis should be made of the exact nature of the services provided by the railway undertakings and to whom such services are sold.

(126) In the case of combined transport of goods, the railway undertakings sell their services only exceptionally to shippers, shipping companies or forwarding agents.

(127) The services provided by the railway undertakings relate essentially to the provision of the locomotive, the driver, access to railway infrastructure and the international coordination of such services between the various undertakings concerned.

(128) The sale of the services to shippers, shipping companies or others is carried out by operators which perform and market combined transport

services using their own or hired wagons, with the essential rail services described above being purchased from the railway undertakings.

(129) Such services are in fact the services in respect of which the railway undertakings enjoyed a statutory monopoly until 31 December 1992, as described in paragraphs 53 to 57.

(130) It follows that the railway undertakings and the combined transport operators do not operate at the same level of the economic process. The combined transport operators are effectively involved in the market for the inland carriage of goods, where they are partially in competition with the other modes of transport. By contrast, the railway undertakings operate on an upstream market involving the provision of railway services (traction, access to infrastructure and international coordination of such services) to the operators.

(131) It is important to note in this respect that the Community railway undertakings concluded amongst themselves in 1992 an agreement establishing a common tariff structure for the sale of such rail services, covering the provision of rail haulage, access to the rail infrastructure and the international coordination of these services to combined transport operators. The agreement defines the structure applicable for determining selling prices to operators and lays down a flat rate of 1 % of the selling price for incidental costs. The agreement was exempted by Commission Decision 93/174/EEC⁽²⁾.

(132) The fact that the railway undertakings deemed it necessary to conclude such an agreement shows that they see themselves as operating on that market for the provision of essential rail transport services to the operators.

(133) Furthermore, the Commission has published in the *Official Journal of the European Communities* a summary of the notification of an agreement between undertakings pursuant to Article 12 (2) of Regulation (EEC) No 1017/68⁽³⁾.

(134) The notification relates to an agreement concluded between British Rail, SNCF and Intercontainer on the setting up of a joint subsidiary, Anglo Continental Intermodal (ACI). ACI will act as a combined transport operator specializing in traffic between the United Kingdom and the European continent via the Channel Tunnel. ACI will purchase the necessary rail services from the railway undertakings of the Member States served.

⁽¹⁾ Case 66/86, [1989] ECR, p. 803.

⁽²⁾ OJ No L 73, 26. 3. 1993, p. 38.

⁽³⁾ OJ No C 57, 27. 2. 1993, p. 5.

(135) However, amongst the arguments put forward to justify the applicability of Article 5 of Regulation (EEC) No 1017/68, the parties claim that 'by stimulating demand for Channel Tunnel rail services, (the agreements) will facilitate the entry of new competitors at an intermediary level into the market for the transport of freight between the United Kingdom and the Continent'.

(136) It is thus apparent that the railway undertakings themselves draw a distinction between, on the one hand, the rail services which they alone are in a position to sell and, on the other, the intermediary level of the operators, which have specific equipment, their own know-how and provide specific services.

(137) The combined transport operators are undertakings which have made very large-scale investment in equipment, notably in specialized wagons and handling equipment, which can be used only for combined transport by rail and can be written off only over long periods. In his *'Forward-looking study on a European combined transport network'*, published in September 1989, the consultant A. T. Kearney estimated the average replacement value of a wagon at ECU 71 000 and the write-off period at 15 years.

He also estimated the replacement value of a 12-metre land-borne container at ECU 9 900 and its write-off period at seven years⁽¹⁾.

It is thus economically impossible for such undertakings to change their activity and, for example, to provide road or inland waterway transport.

For the purposes of their activities, such transport operators do not have any other sources for the supply of rail services than the services provided by the railway undertakings.

(138) In the present case, the rail services provided by DB are thus the only ones that can meet the continual requirements of the combined transport operators working wholly or partly in Germany.

(139) The Commission consequently considers that, for the purposes of this proceeding, the reference market on which DB's dominant position must be assessed is that for the supply of rail services in Germany.

B. *The position of DB on the relevant market*

(140) At the time of the relevant facts, DB held a statutory monopoly for the supply of rail transport services in Germany.

(141) In accordance with the case law of the Court of Justice⁽²⁾, an undertaking which has a statutory monopoly on the territory of a Member State holds a dominant position within part of the common market pursuant to Article 86 of the Treaty, and the territory of a Member State to which such a monopoly applies constitutes a substantial part of the common market.

(142) DB thus holds a dominant position on the relevant market within the meaning of Article 86 of the Treaty.

C. *The key role of DB in the setting of tariffs for the carriage of sea-borne containers to or from Germany*

(143) The carriage of containers via the German ports is carried out by Transfracht, a subsidiary of DB.

(144) Transfracht performs such carriage by purchasing the necessary rail services from DB, whose price, according to the railway undertakings, accounts on average for two-thirds of the operator's final selling price. In addition, Transfracht is a wholly controlled subsidiary of DB.

(145) Consequently, DB wholly controls the level of tariffs charged for carriage via the German ports.

(146) Carriage via the Belgian and Dutch ports is carried out by Intercontainer, which is not controlled by DB. However, Intercontainer is necessarily bound to purchase rail services from DB from the part of the journey performed in Germany.

(147) Since the rail services provided by the railway undertakings represent at least two-thirds of Intercontainer's final selling price, DB, as the compulsory supplier of such services in Germany, has the power to control the level of the selling tariffs charged by Intercontainer.

(148) Account should also be taken of DB's power within the framework of the MCN agreement. The official decision-making body with regard to tariffs is the steering committee, consisting of three representatives nominated by Transfracht and three nominated by Intercontainer. It is provided that 'the members nominated by Transfracht shall be three representatives of DB and Transfracht, and the members nominated by Intercontainer shall comprise one representative of SNCB and one representative of NS.'

(149) Consequently, although tariff decisions are officially taken jointly by the undertakings participating in the MCN agreement, in practice, since it has three representatives out of the six on the Steering Committee, DB has the power to block any decision that does not suit it.

⁽¹⁾ No figures are given for sea-borne containers, which at all events are more expensive.

⁽²⁾ In particular, Case C-41/90 Klaus Höfner and Fritz Elser v. Macrotron [1991] ECR I, p. 1979.

(150) In addition, the day-to-day handling of tariff matters is carried out by the Bureau Commun, whose head is appointed by the Steering Committee and whose staff are appointed by Transfracht and Intercontainer. The Bureau has its offices within Transfracht which thus has considerable power of influence.

(151) Lastly, account should be taken of the statements of the representatives of the MCN member undertakings.

(152) In this regard, the minutes of the plenary meeting of Intercontainer's Management Board on 30 November 1989 state:

'Mr Cornet said he was speaking not only on behalf of SNCB but also, in the absence of the Mr Wansink, on behalf of NS. The protocol concluded with much ceremony between the highest authorities of the three networks was not being applied because the Steering Committee, which was to have been the decision-making and supervisory body for all traffic, had been short-circuited by DB'.

(153) The note to Intercontainer board members drawn up for the plenary meeting of the Management Board on 30 November 1989 states, with reference to the MCN agreement:

'The protocol stipulated that the fundamental decisions (relating, for example, to tariffs) would be taken by the Steering Committee, on which the participating railways, Transfracht and Intercontainer are represented.

The role of "decision-making and supervisory body" assigned to the Steering Committee for all traffic (northern and western) is not being fulfilled. Northern port traffic is being handled directly and exclusively by Transfracht and DB without any participation by the SC. In practice, it has in addition emerged that the power of decision-making as regards tariffs does not emanate from the Steering Committee'.

(154) Furthermore, on 17 April 1989 a meeting was organized in Frankfurt between the representatives of the western ports and DB, NS and SNCB. The minutes of the meeting drawn up by SNCB state:

'DB finally put forward the following proposal:

(a) we should keep the MCN;

(b) we should improve production in a number of areas by connecting Antwerp and Rotterdam to the KLV system:

— as from 29 May, Antwerp will provide a viable connection to Köln Eifelort that will make it possible to distribute in the Rhine-

Ruhr area, Munich, Austria (via Salzburg), Basel, Verona, Stuttgart and Mannheim,

— in the autumn, the same will be done for Rotterdam.

The level of prices will be re-examined in the light of the German political context:

— "favourable" examination of the improved links, "gradual" return to the principles:

— Rheingraben at parity,

— Left bank Antwerp/Rotterdam < Hamburg,

— Right bank Antwerp/Rotterdam > Hamburg,

— 50 % reduction in the difference on 1 January 1990,

— further reduction on 1 July 1990'.

(155) The minutes of the meeting show that DB undertook to re-examine the level of prices and to reduce the price differences between traffic via the northern ports and that via the western ports.

(156) The Commission takes the view that these proposals put forward by DB confirm that it has real power of control over the level of prices charged. Otherwise, it would not make sense for DB to put forward such proposals.

D. Abuse of dominant position

1. General provisions

(157) Pursuant to Article 86 of the Treaty, the application of discriminatory conditions to equivalent transactions constitutes an abuse of a dominant position.

(158) However, it is not part of the Commission's duties to assess as such the level of prices charged by an undertaking or to decide which criteria should govern the setting of such prices.

(159) On the other hand, where different prices are charged for equivalent transactions, it is appropriate to assess whether such differences are justified by objective factors.

2. The concept of 'equivalent transactions'

(160) As stated in points 61 to 71, the services provided by Transfracht from the northern ports and by Intercontainer from the western ports are substitutable services. Nevertheless, it should be noted that, in many cases, the distance between a point in Germany and the western and northern ports differs appreciably.

It is an established fact that, in transport, even through fixed costs are an indisputable factor, the extent of the service provided by the operators depends on the distance to be covered.

- (161) Consequently, although it is not part of the Commission's duties to take the place of undertakings in selecting the criteria to be taken into consideration in setting tariffs, it should nevertheless be concluded that, in view of the characteristics of the transport sector, a comparison of the prices charged cannot be carried out without taking account of the distances covered.

3. The tariffs of Transfracht and Intercontainer

- (162) The tariffs applied in the period 1 July 1990 to 1 July 1992 are set out in Annexes 3 to 9 for traffic to or from a series of major German localities and the northern and western ports.

3.1. Empty containers

- (163) Annex 3 shows the prices for the carriage of empty 40-foot containers, on 1 October 1990 and 1 January 1992, for 14 localities in Germany.

Of these 14 localities, five are nearer to Hamburg and nine nearer to Rotterdam.

On 1 October 1990, the prices from Rotterdam are in all cases higher than those from Hamburg, and the same is true on 1 January 1992 with the exception of traffic to or from Saarbrücken, which becomes less costly via Rotterdam.

- (164) A look at prices per kilometre shows that, on 1 October 1990, in the case of 12 of the 14 destinations, the price per kilometre from Rotterdam is 2 to 77 % higher than the price charged from Hamburg. Only two destinations (Bielefeld and Munich) have a lower price per kilometre from Rotterdam.

However, it may be noted that, in the case of these last two destinations, because of the difference in distance, the total selling price for the supply of carriage remains higher from Rotterdam.

- (165) Some change in the prices per kilometre are evident as from 1 January 1992. On the one hand, the difference between the price per kilometre from the two abovementioned ports narrowed in the case of six destinations: Duisburg, Bochum, Wuppertal, Saarbrücken, Karlsruhe and Neu Ulm. On 1 October 1990, the price per kilometre for these destinations was between 20,4 and 77,6 % more expensive from Rotterdam. On 1 January 1992, the difference was between 2,85 and 51 %.

On the otherhand in the case of three new destinations (Nuremberg, Augsburg and Regensburg), the price per kilometre is lower from Rotterdam than from Hamburg. However, as was the case with Bielefeld and Munich in 1990, the difference has

no effect since the total price remains higher from Rotterdam.

3.2. Full containers

- (166) The attached tables in Annexes 4 to 7 show, in relation to the same destinations, the tariffs applied on 1 July 1990 and on 1 January 1992 for the carriage of full containers, either specific to combined or non-specific.

- (167) On 1 July 1990, for the various types of container, it can be seen that, among the nine destinations closest to Rotterdam, only Saarbrücken has a lower tariff for carriage from Rotterdam.

- (168) Transport to Düsseldorf via Rotterdam is also 143 kilometres shorter via Hamburg, but the tariffs for full non-combined containers are 4,5 % higher from Rotterdam, which means that the price per kilometre from Rotterdam is 55 % higher than that charged from Hamburg.

The tariff for the carriage of full combined containers, by contrast, is identical from both ports.

- (169) On 1 July 1990, for the seven other destinations closer to Rotterdam than Hamburg, the rates are identical from both ports.

This means that, in the case of these destinations, the prices per kilometre from Rotterdam are on average from 4 to 42 % higher than those charged from Hamburg.

- (170) Similarly on 1 July 1990, in the case of the five destinations closer to Hamburg than Rotterdam, it may be seen that the prices are lower from Hamburg.

In the case of these destinations, it may also be seen that the price per kilometre is lower from Rotterdam than from Hamburg; however, this has no impact on the total price because of the greater distance from Rotterdam.

- (171) On 1 January 1992, the situation is identical except for traffic to Düsseldorf. The tariffs for the carriage of full non-combined containers to Düsseldorf are now identical from both Hamburg and Rotterdam.

3.3. Specialized KLV trains⁽¹⁾

- (172) Annexes 8 and 9 show the tariffs for the carriage of container by complete KLV trains. These specialized block trains were introduced by DB on 1 July 1988 for 27 destinations from the German ports.

Similar trains were introduced for carriage to eight destinations from the western ports as from 1 October 1989. On 1 July 1991, KLV trains were introduced for 10 new destinations from the western ports.

⁽¹⁾ Kombiniertes Ladungsverkehr.

- (173) The tariff as at 1 October 1989 shows that seven of the eight destinations in question are closer to Rotterdam than Hamburg; the differences in distance range from 22 to 143 kilometres.

The prices for the carriage of full 20 and 40-foot containers are always higher from Rotterdam.

The tariff per kilometre is lower from Rotterdam only in the case of carriage to Munich. However, the total price of the carriage remains higher from Rotterdam.

In the other cases, the price per kilometre from Rotterdam is 10 to 77 % higher than the price charged from Hamburg.

- (174) On 1 July 1991, 12 of the 18 destinations served by KLV trains were closer to Rotterdam than Hamburg. However, with the exception of Saarbrücken, the price for carriage from Rotterdam is always higher than the price from Hamburg.

The price per kilometre from Rotterdam is lower than that from Hamburg for six destinations. However, the destinations in question are further from Rotterdam than Hamburg. Consequently, even in these cases, the total price of carriage remains higher from Rotterdam.

- (175) All in all, in the case of all the types of carriage examined, it may be seen that the tariffs from the western ports are, except in isolated cases, significantly higher than those charged from the northern ports.

A look at the prices per kilometre shows that, with a few exceptions:

- the price per kilometre for the destinations closer to Rotterdam is appreciably higher for carriage via Rotterdam than for carriage via Hamburg,
- the price per kilometre for carriage via Rotterdam is lower only where the distance via Hamburg is lower and results in a lower overall price for carriage via Hamburg.

- (176) Transfracht acknowledged the existence of such differences in tariffs in its letter of 20 December 1991 to the Commission.

- (177) Such differences are also acknowledged by Intercontainer. In the 'note to members of Intercontainer's Management Board of 21 June 1990', it is stated that, amongst the measures to be taken at commercial level, there should be a 'reduction of the disparity between the rates for the northern ports and those for the western ports, to be achieved by increasing prices in the north while leaving those in the west unchanged'.

4. The position of the undertakings regarding the discriminatory nature of the tariff differences

- (178) The Commission notes that the tariff differences are considered by the representatives of the railway

undertakings and the representatives of Intercontainer to be practices attributable to DB.

4.1. The position of Intercontainer

- (179) Thus, the 'note to board members' concerning item 6 on the agenda for the meeting of Intercontainer's Management Board of 25 February 1986 states with regard to container transport:

'As regards competition on the western port — northern port routes, there is a certain rivalry between Transfracht (traffic from and to the northern ports) and Intercontainer (traffic from and to the western ports), DB having always insisted on the special importance it attaches to exploiting the longer, and hence more profitable, lines from and to the west German seaports.'

- (180) The 'note to board members' concerning item 6 on the agenda for the meeting of Intercontainer's Management Board of 30 November 1989 has the following to say on the same subject:

Point 2.1

The obstacle which the railways are coming up against in traffic from and to the western ports is not the (intense) competition from other modes of transport but an objective, internal conflict: although SNCB, NS and DB wish to develop traffic from and to the western ports, DB is seeking above all not to jeopardize its relations and links with the northern ports.'

Point 2.3

Tariff structure

The tariff basis applied to multi-port supply was established in accordance with the tariff structure of the "InGrid" model. Thanks to competitive prices, InGrid was able, in traffic with the German seaports, to achieve considerable success on the market. When the InGrid structure was "transposed" to the western ports within the framework of MCN, account was taken not so much of market prices on the western route as of tariff protection measures for traffic to and from the northern ports.

There are, therefore, within "multi-port supply", two tariff structures: a competitive and flexible price system applied to northern port traffic on the one hand and, on the other hand, on the western routes, a structure not in keeping with the competitive situation and extremely difficult to change.'

Point 3.1

MCN was launched at a joint press conference in Aachen. The public statement augured well for the future, although it was made clear that MCN supply would certainly have to be further developed and improved in the light of the market's reaction.

After this long incubation period, customer interest was manifest; on the other hand, the prices and services on offer did not exactly arouse wild enthusiasm. The measures taken with the political aim of protecting northern port traffic meant that MCN was able only in a few exceptional instances to propose competitive prices on the western routes.

No sooner had MCN been created than DB introduced, within the framework of the "KLV-Neu", a new tariff structure for carriage from and to the northern ports, offering in some cases, considerable price reductions. The difference between the equal price limits imposed on some and the unequal price reductions granted to others soon undermined the credibility of the supply of rail services from and to the western ports.

- (181) The minutes of the plenary meeting of Intercontainer's Management Board of 30 November 1989 state with regard to MCN: 'The Chairman wound up the discussion, saying that MCN was far from having lived up to expectations. One of the reasons, and probably the main reason, for that failure was the price-freeze policy pursued by DB. The latter would therefore have to make concessions in that area if a way out was to be found'. The 'Chairman' being referred to is the Chairman of Intercontainer's Management Board, who is at the same time the Swiss Railways' Director of Goods.

4.2. The position of SNCB and NS

- (182) The abovementioned minutes state in this respect that 'Mr Lorenz (DB) could accept neither the conclusions of Intercontainer's report nor the criticisms made of DB by the Benelux networks'.

The criticisms in question relate to the discriminatory tariffs denounced by SNCB and NS.

- (183) At the hearing, the SNCB representative, who was also representing Intercontainer, stated (hearing minutes, pages 66 and 67):

'DB has for a very long time (more than a century) been pursuing a policy of price differentiation between domestic and international carriage. Its prices are much lower for domestic carriage ...'

'SNCB and Intercontainer operate at international level. They are thus obliged to collaborate with DB, and thus forced to suffer the disadvantages of that policy.'

- (184) The SNCB representative also explained in the following manner the meaning of the phrase 'limit sterile competition in the German market between Transfracht and Intercontainer' used by an NS representative and quoted in the statement of objections:

'The NS representative obviously meant that it was sterile on the part of DB to maintain high prices internationally in order to protect German domestic rail traffic.'

4.3. The position of the DB/Transfracht group

- (185) On 28 November 1988 the associations of the Rotterdam and Antwerp port undertakings (SVZ and AGHA) wrote to the German Minister for Transport complaining against the discriminatory rail carriage tariffs favouring routes through Germany.

- (186) In response to the letter, Transfracht sent a memo to the German Minister for Transport on 16 January 1989 explaining the situation. In the memo, Transfracht states that '... what AGHA and SVZ say is largely true ...'.

- (187) The Commission notes that, in the memo, Transfracht, a subsidiary of DB, acknowledges the existence of discrimination between the northern and western ports.

- (188) As already stated in point 154, a meeting was held in Frankfurt on 17 April 1989 between the representatives of the western ports, DB, NS and SNCB. The record of the meeting shows that DB suggested re-examining the tariff situation in order to reduce the differences between traffic to the western ports and traffic to the northern ports.

The Commission takes the view that, by putting forward such proposals, DB acknowledges that there are discriminations between the traffic routes, since there would otherwise be no point in DB's undertaking to 'reduce the differences' between such routes.

(189) In its reply to the statement of objections and at the hearing, DB acknowledged the existence of price differences, but denied that they amounted to discrimination. DB considers that such tariffs are set mainly on the basis of production costs and the competitive situation on the market, with distance being taken into account only as a third factor.

(190) As stated in point 158, it is not part of the Commission's duties to decide on the basis of which criteria an undertaking must establish its tariffs, but to ensure that the relevant criteria are not applied by the undertaking in such a way as to result in discrimination.

5. The importance of the distance criterion in the setting of tariffs

(191) The following factors should be taken into account in this respect:

(192) In its abovementioned letter of 20 December 1991 to the Commission, Transfracht stated:

'Goods neutrality means that the prices must always be set regardless of the nature of the goods carried. The only relevant criteria are the weight and size of the containers and the distance to be covered 'Port neutrality is ensured through the so-called grid system, which divides Germany into 144 areas. All points of departure and arrival within the same area correspond to one and the same net price, which depends on the distance between the area and the ports ...'.

(193) It may be seen from these statements that, while the real setting of the price depends on the competitive situation on each route and the type of container being carried, the basic principle for the setting of the tariff is nevertheless the distance between each area and the port.

(194) The Commission notes moreover that the geographical division of Germany into 'areas' reflects the obvious desire to set the tariffs mainly on the basis of distance. Traffic to or from an area can involve different products that are carried in containers of different sizes and in respect of which intermodal competition is not similar. The only common element to such traffic is thus the distance to or from the ports.

(195) In addition, the record of the meeting held on 17 April 1989 and referred to in point 188 stipulates that DB proposed a 'gradual return to the following principles:

- Rheingraben at parity,
- Left bank Antwerp/Rotterdam < Hamburg,
- Right bank Antwerp/Rotterdam > Hamburg.'

The distinction between 'left bank and right bank' corresponds to the distinction between the three areas closer to the western ports and those closer to the northern ports.

The proposal put forward by DB that the tariffs for the areas closest to Antwerp/Rotterdam should be lower than the tariffs applied from Hamburg for the same areas indicate that the basic principle for the determination of the tariffs is distance. It would otherwise make no sense for DB to make such proposals.

(196) Lastly, the charts attached in Annexes 10 and 11 show the tariff for the carriage of full 40-foot containers in relation to the distance of the point served from Hamburg and Rotterdam. The charts reveal that there is indisputably a correlation between the two sets of data. (The figures are given in Annex 5).

(197) The Commission deduces from all these factors that, in the context of this proceeding, while the setting of the tariffs for carriage does not depend solely on the distance in kilometres, that distance is nevertheless an important criterion taken into consideration by the relevant undertakings in setting the tariffs between points in Germany and each of the ports in the northern range.

(198) However, it is clearly evident from examination of the tariffs applied that this criterion aimed at ensuring port neutrality has not been applied objectively in setting the tariffs between the northern and western ports and cannot justify the differences between the western and northern routes.

6. Argument relating to the competitive situation

(199) According to DB, the price discrepancy between traffic to the western and the northern ports is largely due to important differences regarding the competitive situation between the different modes of transport.

(200) During the proceeding, DB's representatives stated that the differences in intermodal competition were due, firstly, to a different tariff policy in the three Member States concerned with regard to road transport, secondly, to different inland waterway competition and, lastly, to differences in road haulage competition depending on the types of containers.

- (201) With regard to the road haulage of goods, DB's representatives explain, rightly, that the domestic tariffs in Germany are set by the public authorities in accordance with the provisions of the Road Haulage Law (GüKG). The main objective of the law, as laid down in Article 7 in particular, is to harmonize the conditions of competition between road haulage and rail freight traffic.
- (202) There is no such legislation in the Netherlands or in Belgium, where prices are set freely by hauliers.
- (203) According to DB's representatives, this means that competition in road haulage is much fiercer in Belgium and the Netherlands than in Germany.
- (204) Moreover, DB's representatives stressed the importance of competition from inland waterway carriers using the Rhine, competition which does not exist elsewhere.
- (205) These differences regarding the competitive situation were confirmed at the hearing by NS's representative, who stated that 'on the lines Rotterdam-Germany, the competition from other modes of transport is much fiercer than on the lines from the Northern harbours to final destinations in Germany... The problem in practice is that the competition from inland waterways and from roads transport on the axis between Rotterdam and the German hinterland is in general so fierce that it is hardly possible to compete above cost price...' (hearing minutes, page 150).
- (206) The Commission considers that these arguments cannot justify the price differences found in the present case.
- The Commission takes the view that the combined effects of, on the one hand, fierce competition from road haulage and inland waterways for traffic via the western ports and, on the other, of weak road haulage competition and the absence of inland waterway competition for traffic via the German ports should economically be reflected on higher prices for traffic in Germany than for traffic via the western ports. However, the tariff situation found in this proceeding is precisely the opposite.
- (207) The Commission consequently considers that the arguments relating to intermodal competition put forward by DB and confirmed by NS cannot justify the price differences found, but that such arguments show on the contrary that such tariffs are economically unfounded.
- (208) In its letter to the Commission of 20 December 1991, already referred to in point 38, Transfracht stated with reference to intermodal competition that, for 20-foot containers, the train had technical advantages over the lorry that did not exist in the case of 40-foot containers and that consequently these factors would have an effect on the level of prices charged.
- (209) Examination of the tariffs applied under the MCN agreement and set out in Annexes 3 shows that the price differences found to exist between the western and northern ports are practically identical in the case of 20- and 40-foot containers.
- (210) The argument based on the difference in competition depending on the types of containers cannot therefore explain the price differences found.
- (211) The Commission notes moreover that the lack of any link between the prices charged and the competitive situation is acknowledged by Intercontainer in the 'note to board members' drawn up for the Management Board meeting of 13 November 1989. The note states that:
- 'MCN was set up in order, through a flexible but combative supply of multi-port services, to develop maritime transport as a whole in the Federal Republic of Germany, including traffic via the ARA ports. In practice, however, the principal precondition was missing: the freedom to operate on the market with tariffs in keeping with market requirements and the competitive situation'.
7. The taking into account of production costs
- (212) During the proceeding, DB's representatives stated that the differences in tariffs were due to differences in costs, since costs were higher for traffic to the western ports than for traffic to the German ports. According to DB, such cost differences were due to three factors:
- rail traffic via the northern ports is on a much larger scale and allows use to be made of block trains, which are economically more efficient than separate consignments,
 - rail infrastructures are claimed to be of better quality in the northern ports than in the western ports,
 - crossing of the frontiers between Germany and Belgium/the Netherlands is claimed to entail additional expenses.
- (213) The validity of these arguments should be examined individually, then as a whole.

7.1. Differences in traffic

- (214) DB's representatives stated that the carriage of separate containers involves considerable costs that do not apply to carriage by block trains.

The provision of such block trains is claimed to be easier from the German ports because the volume of traffic is much higher than from the western ports. DB states in this respect that, in 1991, the number of full sea-borne containers carried by rail to or from the various ports was as follows:

- Hamburg [...] containers,
- Bremen/Bremerhaven [...] containers,
- Rotterdam [...] containers,
- Antwerp [...] containers.

- (215) The Commission notes firstly that the comparisons of tariffs carried out above in points 172, 173 and 174 relate to block trains operated from the northern ports and from the western ports. However, such comparisons reveal significant tariff differences between block trains, and not just between block trains and semi-grouped or separate consignments.

- (216) Furthermore, though it may at first sight appear that a large number of containers arriving in a port allows a greater number of block trains to be provided, the correlation between the two phenomena is not absolute. Because of the geographical size of Germany, the containers unloaded in the German ports may require final inland transport to a large number of different destinations and not necessarily allow the provision of block trains.

- (217) It should also be noted that the number of containers carried by rail to or from Hamburg is 85 % greater than the number of containers carried to or from Bremen/Bremerhaven.

- (218) Applying the arguments put forward by DB, the number of block trains provided from the other German ports. Economically, this should result in lower prices for rail carriage to and from Hamburg than to and from Bremen/Bremerhaven.

- (219) A look at the selling tariffs applied under MCN shows that on 1 July 1990 there were three different tariffs for carriage via the three German ports: Hamburg, Bremen and Bremerhaven.

- (220) Annex 12 shows the tariffs on 1 July 1990 for the carriage of containers between 18 destinations in Germany on the one hand and Hamburg and Bremen on the other.

This shows that, for 16 destinations, carriage from Bremen is cheaper from Hamburg and that, in the case of two destinations the prices are identical.

- (221) On 1 October 1990, the prices for carriage from Bremen and Bremerhaven were brought into line with the Hamburg tariff applicable on 1 July 1990. Since then, a common tariff has applied to the three German ports in the same way as a single tariff applies to the Benelux ports, notwithstanding the differences in traffic between the ports.

- (222) These factors show that the number of containers passing through a port has no appreciable influence on the level of selling prices of operators. This is the only possible explanation for the fact that, on 1 July 1990, the prices from Bremen and Bremerhaven were lower than those from Hamburg, even though traffic from Hamburg was twice as high.

Similarly, there is no other possible explanation for the fact that tariffs from the three ports were identical as from 1 October 1990.

- (223) Furthermore, in all sectors of the economy, it is the consistent practice of suppliers to have a basic selling price on which discounts are granted to certain customers on the basis of the quantity purchased. At the hearing, Transfracht's representatives stated that, under the MCN agreement, the prices published were net prices, but that discounts were granted to certain large customers (hearing minutes, pages 171 and 172).

- (224) It must therefore similarly be concluded from the fact that quantity discounts are granted on the basic tariff that the basic tariff is not determined by reference to the quantities transported, or that, if this latter factor is taken into account, its influence on the determination of the selling price is not significant.

It would not make sense for the undertakings to take account of the quantities carried firstly in drawing up the tariffs and secondly in the negotiations with customers.

- (225) All in all, the Commission is of the opinion that the difference in the number of containers carried to and from the western and the northern ports is not such as to justify the differences found in the levels of transport prices.

7.2. The quality of rail infrastructure

- (226) According to DB, infrastructure quality in the western ports is inferior to that in the northern ports and results in additional costs. DB refers notably to the difference in the number of kilometres of track in the ports.

(227) The Commission notes firstly that a large amount of track infrastructure does not necessarily mean that the structure is efficient and allows transport costs to be cut appreciably.

(228) As far as the efficiency of port facilities is concerned, account should also be taken of the results of a study carried out in 1990 by the consultant Marconsult on the organization and costs of container transshipment in the main European ports⁽¹⁾.

Such costs are as follows for the ports in question (average cost per container):

- Antwerp : Lit 116 000,
- Rotterdam : Lit 159 000,
- Bremerhaven : Lit 163 000,
- Hamburg : Lit 188 000.

(229) In the light of all these factors, the Commission takes the view that it is not proven that the quality of infrastructure in the western ports is deficient and imposes additional costs compared with the northern ports.

7.3. Expenses incurred when trains cross frontiers

(230) The third argument put forward by DB in respect of costs relates to the expenses incurred when trains cross the Belgian and Dutch frontiers. Such expenses are said to be due mainly to the changing of locomotives and to customs duties and the costs of apportioning revenue as between the undertakings.

(231) DB claims that the changing of locomotives is necessary because of the different systems of electrical power.

However, in a December 1991 publication entitled *'Rail without frontiers — freight traffic'*, the International Union of Railways states that the average time needed to change locomotives at frontiers is no more than 15 to 20 minutes and that multicurrent locomotives are used between Germany and Belgium in particular, thus avoiding the need for any locomotive changeover.

(232) As far as the argument relating to customs duties for transport to or from Belgium and the Netherlands is concerned, the Commission considers firstly that this argument can relate only to imports from non-Community countries. Furthermore, customs formalities are increasingly frequently

carried out by the undertakings at the start of the transport operation or in the ports and not during inland transport.

(233) Furthermore, in a study on international combined transport⁽²⁾, the consultant A. T. Kearney produced a map of frontier crossing points that were reported to be difficult and to entail additional costs. The map attached in Annex 13 identifies 12 difficult frontier crossing points in Europe but none are at the frontiers between Belgium, the Netherlands and Germany.

(234) Consequently, the Commission is of the opinion that the argument relating to frontier crossing costs cannot justify the large differences in tariffs.

7.4. The taking into account of production costs in overall terms

(235) During the proceeding, DB's representatives stated that the tariff differences noted were largely due to differences in the costs of the rail services.

(236) DB illustrated this by sending the table attached in Annex 13 and showing, for 20 major destinations, the price of the rail services supplied by DB for carriage to Hamburg and the total price of the same services supplied by DB and NS for carriage to Rotterdam.

(237) Annex 15 takes the same table and shows, in the case of traffic to Rotterdam, the total price of the rail services supplied by DB and NS divided by the number of kilometres covered, thus giving a price per kilometre.

(238) Examination of the figures provided by DB shows that the average price per kilometre of the rail services sold by DB and NS for transport operations carried out by Intercontainer to Rotterdam is lower than the average price for the same services supplied by DB to Transfracht for transport operations to Hamburg.

(239) The Commission takes the view that these figures contradict DB's argument that the differences in price at operator level are due to differences in rail costs.

On the contrary, it is apparent that the rail cost per kilometre borne by operators carrying out transport operations to the west is lower than the cost per kilometre for transport operations to the north.

(240) On the basis of these figures, the Commission considers that it cannot properly be argued that substantial differences in rail costs are due to the differences in selling prices charged under the MCN agreement.

⁽¹⁾ Indagine sull'organizzazione ed i costi portuali per la movimentazione di contenitori nei principali scali Europei. Genoa 1990.

⁽²⁾ See point 137.

- (241) The lack of any significant difference in costs explains the trend in tariffs described in point 171 in relation to transport operations to Düsseldorf.

In 1990, the price of carriage of full containers from Hamburg to Düsseldorf was lower than that from Rotterdam to Düsseldorf, even though Rotterdam is 143 km closer.

On 1 October 1991, price parity between the two ports was obtained by aligning the price from Hambourg on the price from Rotterdam.

- (242) However, if as DB indicates costs were significantly higher for transport operations from Rotterdam, a price increase limited to transport operations from Hambourg would not make economic sense.
- (243) All in all, the Commission considers that the substantial differences in combined transport prices between the routes from the western ports and those from the northern ports are not justified by objective factors. The arguments put forward by DB cannot, either separately or when taken together, justify the price differences found.
- (244) Furthermore, it is evident from numerous documents obtained during the proceeding that the representatives of the railway undertakings, including Transfracht, acknowledge the existence of discrimination.
- (245) It is thus established that, since 1988 at least, DB has used its dominant position on the rail transport market to impose discriminatory selling prices on the market segment relating to combined transport of sea-borne containers to or from Germany via the Belgian, Dutch and German ports, in order to promote its own services and those provided by its subsidiary Transfracht.
- (246) DB operates, on the one hand, on the market for rail services as the sole supplier of such services on German territory, and, on the other, on the upstream market for inland transport through the intermediary of its subsidiary Transfracht, which is the sole combined transport operator providing carriage of sea-borne containers via the German ports.
- (247) The discrimination has consisted in imposing significantly higher transport tariffs, as applied by the operators, for carriage between a Belgian or Dutch port and Germany than for carriage between places in Germany and the German ports, so as to promote the rail links which are most profitable for the DB, since it supplies all the relevant rail

services and its subsidiary Transfracht supplies all the relevant combined transport.

- (248) In accordance with the case-law of the Court of Justice⁽¹⁾, where an undertaking in a dominant position on a market uses its dominant position to impose discriminatory conditions in respect of equivalent transactions on a second market, thus promoting its own services, this constitutes an abuse within the meaning of Article 86 of the Treaty.

E. Effect on trade between Member States

- (249) The relevant practices relate to the carriage of containers to or from Germany via the German, Belgian or Dutch ports. Such practices thus affect trade between Member States, and in particular between Germany, Belgium and the Netherlands.
- (250) The practices examined above which have been engaged in by the Deutsche Bundesbahn since at least 1988 thus contravene the provisions of Article 86 of the Treaty.

F. Economic effects of the relevant practices

- (251) The carriage of containers between the western ports and Germany and between the northern ports and Germany have developed as follows since 1988:

	1988	1989	1990	1989/ 1990 (%)	1991	1990/ 1991 (%)	1989 to 1991 (%)
Carriage from western ports to Germany (Intercontainer in TEU)	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Carriage from northern ports to Germany (Transfracht-DB) (in containers)	[...]	[...]	[...]	[...]	[...]	[...]	[...]

- (252) A look at these figures confirms the analysis made by Intercontainer's Management Board on 30 November 1989, namely that 'the discrepancy between the parity price limits imposed on some and the unequal price reductions granted to others quickly undermined the credibility of rail supply for the western ports'.

⁽¹⁾ In particular Case 311/84 CBEM v. CLT and IPB ('Tele-marketing') [1985] ECR, p. 3271.

This is evident in the period 1989 to 1991 in an increase of almost 20 % in traffic via the German ports as against a decline of 10 % via the western ports.

- (253) Similarly, at the hearing, SNCB stated with reference to the tariff discrimination between routes (hearing minutes page 67):

'In the 1980s, there was no change in the situation. Moreover, it bore fruit.

At national level, DB carries, as the complainant states, [...] % of the sea-borne containers passing through the German ports.

At international level, on the other hand, the results are catastrophic: the railways' share is very small for traffic transiting through the Benelux ports to the German hinterland:

- scarcely [...], while
- [...] is carried by road, and
- [...] by inland waterway.

The railways might just as well be said not to exist.'

- (254) These figures have to be set alongside those showing total container traffic (points 21 and 22 a) between the western and northern ports and places in Germany.

It is established that the tariff policy imposed by DB had the twin effects to:

- resulting in preference being given for imports and exports to and from Germany through the port of Hamburg, witness the trend of traffic in recent years (points 20 to 24),
- making economic operators operating from Belgium and the Netherlands switch to modes of transport other than the railways. This explains in part the above figures giving the breakdown of traffic between modes of transport.

G. Article 22 (2) of Regulation (EEC) No 1017/68

- (255) Pursuant to Article 22 (2) of Regulation (EEC) No 1017/68, the Commission may impose on undertakings fines of from ECU 1 000 to 1 000 000, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of each of the undertakings participating in the infringe-

ment, where either intentionally or negligently they commit an infringement of Article 86 of the Treaty; in fixing the amount of the fine, regard must be had both to the gravity and to the duration of the infringement.

- (256) The Commission considers that a fine should be imposed on DB for such infringement having regard to the following factors:

- (257) Comparisons of tariffs show that an infringement existed from 1 October 1989 to 31 July 1992, the date on which the statement of objections was sent.

- (258) The documents obtained during the proceeding show that the infringement was committed intentionally. The representatives of the ports of Rotterdam and Antwerp drew DB's attention on several occasions to the tariff discriminations of which they were victims and threatened to lodge a complaint on the grounds of infringement of the competition rules. DB's representatives could not therefore be unaware of the risks incurred.

- (259) In addition, Transfracht's letter of 16 January 1989 to the German Minister for Transport, referred to in point 186, shows that the management of the DB group was fully aware of the existence of discriminations. On the question of the gravity of the infringement, the Commission considers that, in general, practices aimed at restricting price competition are a matter of indisputable gravity.

- (260) Furthermore, in the present case, the infringement is of particular gravity since it consisted in DB's abusing its monopoly on the market for railway services in Germany in order to shield itself from competition from other undertakings and promote its own services and those of its subsidiary on another market, namely that for the inland carriage of sea-borne containers to or from Germany via a German, Belgian or Dutch port.

- (261) By artificially maintaining price differences, the infringement is also aimed at partitioning markets and deflecting traffic. It thus prejudices one of the fundamental objectives of the Treaty, which is the establishment of a single market.

- (262) DB's practices also have the effect of impeding the development of rail transport and run counter to the policy of the Community and of the Member States, which aims on the contrary to promote the use of this mode of transport.

(263) The Commission notes lastly that, during the proceeding, no undertaking was given by DB that it would remedy the practices in question,

HAS ADOPTED THIS DECISION:

Article 1

Deutsche Bundesbahn, Société Nationale des Chemins de Fer Belges, Nederlandse Spoorwegen, Intercontainer and Transfracht Deutsche Transportgesellschaft mbH have infringed the provisions of Article 85 of the EC Treaty by concluding the maritime container network agreement of 1 April 1988 providing for the marketing, by a Bureau Commun, on the basis of tariffs agreed within the Bureau, of all carriage by rail of sea-borne containers to or from Germany via a German, Belgian or Dutch port.

Article 2

Deutsche Bundesbahn has infringed the provisions of Article 86 of the EC Treaty by using its dominant position on the rail transport market in Germany to impose discriminatory rail transport tariffs on the market for the inland carriage of sea-borne containers to or from Germany via a German, Belgian or Dutch port.

Article 3

Deutsche Bundesbahn, now Deutsche Bahn, is hereby required to put an end to the infringement referred to in Article 2.

Article 4

A fine of ECU 11 million is hereby imposed on Deutsche Bahn in respect of the infringement of the provisions of Article 86 of the EC Treaty referred to in Article 2.

Article 5

The fine imposed in Article 4 shall be paid, in ecus, within three months of the date of notification of this Decision, into bank account No 310-0933000-43 of the

Commission of the European Communities, Banque Bruxelles-Lambert, Agence Européenne, Rond Point Schuman 5, B-1040 Brussels.

After the expiry of that period, interest shall be automatically payable on the fine at the rate charged by the European Monetary Cooperation Fund for transactions in ecu on the first working day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 9,75 %.

Article 6

This Decision is addressed to:

- Deutsche Bahn AG,
Hauptverwaltung,
Friedrich-Ebert-Anlage 43-45,
D-60327 Frankfurt am Main;
- Société Nationale des Chemins de Fer Belges,
rue de France 85,
B-1070 Brussels;
- NV Nederlandse Spoorwegen,
Hoofddirectie,
Moreelsepark,
Postbus 2025,
NL-3500 HA Utrecht;
- Transfracht,
Deutsche Transportgesellschaft mbH,
Gutleutstrasse 160-164,
D-60327 Frankfurt am Main;
- Intercontainer,
rue de France 85,
B-1070 Brussels.

This Decision shall be enforceable pursuant to Article 192 of the EC Treaty.

Done at Brussels, 29 March 1994.

For the Commission

Karel VAN MIERT

Member of the Commission